



Billing Code 4310-55-P

## **DEPARTMENT OF THE INTERIOR**

### **Fish and Wildlife Service**

#### **50 CFR Part 85**

**[Docket No: FWS–HQ–WSR–2015–0006; FVWF94100900000-XXX-FF09W11000]**

**RIN 1018–AW66**

#### **Clean Vessel Act Grant Program**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Advance notice of proposed rulemaking; notice of intent.

**SUMMARY:** The U.S. Fish and Wildlife Service (Service) is seeking comments to assist us in developing a proposed rule for the Clean Vessel Act Grant Program (CVA). The proposed rule will use plain language to clarify topics that have led to varying interpretations and will incorporate changes in legislation and technology. We seek public input to advise us on topics of interest to the boating community in regard to projects funded through CVA. We ask for response from anyone having an interest in CVA and associated topics, but particularly from members of the public having experience, expertise, or both in administering CVA; entities receiving services from CVA-funded facilities; entities manufacturing, selling, or installing CVA-funded facilities and equipment; or persons possessing other professional or practical knowledge of the subjects we present in this document. We present topics of interest, but encourage comments on any topic relevant to CVA and the proposed rulemaking. The terms *you*

or *your* in this document refer to those members of the public from whom we seek response. The terms *we*, *us*, and *our* refer to the U.S. Fish and Wildlife Service.

**DATES:** Submit comments on or before [INSERT DATE 60 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by docket number FWS–R9–WSR–2015–0006, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- U.S. mail: Public Comments Processing, Attn: Docket No. FWS–R9–WSR–2015–0006; U.S. Fish and Wildlife Service; Division of Policy, Performance, and Management Programs; MS: BPHC; 5275 Leesburg Pike, Falls Church, VA 22041–4501.
- Hand Delivery/Courier: U.S. Fish and Wildlife Service; Division of Policy, Performance, and Management Programs; 5275 Leesburg Pike, Falls Church, VA 22041–4501.

We will not accept e-mail or faxes. All submissions received must include the agency name and docket number for this rulemaking. We will post all comments received without change to <http://www.regulations.gov>, including any personal information provided. For detailed instructions on submitting comments and other information on the rulemaking process, see the “Public Participation” heading in **SUPPLEMENTARY INFORMATION**.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> and search for FWS–R9–WSR–2015–0006.

**FOR FURTHER INFORMATION CONTACT:** Lisa E. Van Alstyne, Wildlife and Sport Fish Restoration Program, Division of Policy and Programs, U.S. Fish and Wildlife Service, 703–358–1942.

## **SUPPLEMENTARY INFORMATION:**

### **Background**

The Clean Vessel Act of 1992 (Act) (Pub. L. 102-587, title V, subtitle F) amends the Sport Fish Restoration Act (16 U.S.C. 777c) and establishes a program that provides matching grants to States for projects that address septic waste from recreational vessels. Grants may be used to conduct coastal surveys and establish plans; construct, renovate, operate, and maintain pumpout and other waste reception facilities for recreational vessels; and conduct programs to educate boaters about the environmental and health issues associated with improperly disposing of human waste. Priority consideration was established in the Act for projects that are in coastal States, include public/private partnerships, and include innovative ways to increase project availability and use. The Sportfishing and Recreational Boating Safety Act of 2005 (SAFETEA–LU) (Pub. L. 109-59, Title X, section 10131) amends the Clean Vessel Act to remove the preference for projects in coastal States.

Since inception, the Clean Vessel Act grant program (CVA) has awarded more than \$246 million. The projects funded have helped States to build an infrastructure that links services within and between States and raised awareness of the benefits of properly disposing of septic waste. As a result, States have experienced a reduction in beach and shellfish bed closures, enhanced boater awareness and satisfaction, and improved water quality in recreational areas.

In the 1990s, we published in the **Federal Register** three documents related to CVA: Clean Vessel Act Pumpout Grant Program, Final rule (59 FR 11204, March 10, 1994); Clean Vessel Act: Pumpout Station and Dump Station Technical Guidelines, Notice of final guidelines (59 FR 11290, March 10, 1994); and Clean Vessel Act Pumpout Symbol, Slogan, and Program Crediting, Final rule (62 FR 45344, August 27, 1997). The CVA regulations are located in title 50 of the Code of Federal Regulations (CFR) in part 85 (50 CFR part 85).

As we move forward in the program, we propose not only to build on the success of CVA to date, but also to seek new and innovative ways to serve the boating public into the future. We hosted four open forum discussions between October 2014 and February 2015 in which we asked States and other stakeholders to share their knowledge and opinions on topics associated with implementing CVA nationally. Participants informed us on challenges to implementation and consistency that have arisen since the program began, changes in focus that have evolved as the program has matured, and successful approaches they would like to continue. These discussions prompted us to seek input on certain topics from a larger audience.

### **Information Requested**

With this advance notice of proposed rulemaking (ANPR), the Service is seeking information, comments, and suggestions that will help us to consider how best to address updating the CVA regulations and Technical Guidelines. We ask for your help in identifying significant issues that interfere with participation in CVA, administration of CVA, services provided under CVA, or successful implementation of CVA projects. We ask for your responses on successful approaches or foundational benefits that you suggest we should preserve in future rulemaking. We intend to use your input to develop updated regulations and guidelines in one

location at 50 CFR part 85. After receiving and considering your responses to our requests in this ANPR, we will publish a proposed rule in the **Federal Register** for public review and comment. In particular, we encourage you to give comments and suggestions on the issues described in the body of the ANPR. When commenting, please indicate which of the listed issues your comment addresses and to which question you are responding. If your comments cover issues outside of those listed, please identify them as *Other*.

There are several topics where your response may reference a State or local law, regulation, standard, or other legal reference. When your comments include a legal reference, please specifically cite the legal document. We recommend you use citation formats in *Association of Legal Writing Directors (ALWD) Guide to Legal Citation* or *Bluebook: A Uniform System of Citation* as your guide. If possible, please give a location where we may access the document electronically.

#### **Issue 1: Technical information.**

(a) The Technical Guidelines (Guidelines) issued on March 10, 1994, reflect a collaborative effort between the Service and various entities that have expertise or interest in boating, clean water, waste disposal equipment, and other associated topics. We consulted with the Environmental Protection Agency (EPA), the U.S. Coast Guard (USCG), and the National Oceanic and Atmospheric Administration (NOAA) when developing the guidelines. We also asked for advice and input from States, local municipalities, boat users, manufacturers of pumpout equipment, marina operators, conservation groups, interest organizations, and the public. The resulting document reflects the best available knowledge at that time and informs the

public on basic principles that were foundational to the grant program in the beginning stages of development.

(b) We are aware that advances have been made in technology, technique, and approach since we published the Guidelines. Through this notice, we ask for those same groups and any new user and interest groups, technical experts, and practitioners to advise us on some specific and some general technology issues. When responding to a topic, please address to the extent possible the following regarding the technology, technique, or approach:

- (1) For technology, if it is currently available or would need to be developed;
- (2) Cost;
- (3) Expertise needed;
- (4) Supporting infrastructure or other technology needed;
- (5) Long-term personnel investment; and
- (6) Any known obstacles.

(c) We ask that if you have knowledge of such advancements, you discuss developments that have been made since 1994, or are anticipated in the next few years, that improve, support, or otherwise affect CVA. Discuss how you suggest we should use this information to inform new guidelines.

(d) We ask your comments on these specific topics:

(1) States that experience seasonal cold weather likely have pumpout facility operators that choose to close for the season, winterize their pumpout equipment, or both. However, boaters may travel to those areas seeking pumpout services. What technology, technique, or approach would address the need to provide pumpout services in cold weather areas?

(2) How important is it for States to monitor the amount of waste removed through pumpouts? Should the guidelines strongly recommend meters or other “add-on” equipment to accomplish this? Should the regulations require it? If so, when should the new requirement be effective?

(3) Floating restrooms are eligible for CVA funding. However, with the emphasis of the program on providing facilities that benefit boaters, the current regulations state they cannot be connected to land or anything else that is connected to land, restricting floating restrooms to water-only access. Therefore, floating restrooms connected to an attached dock cannot be funded through CVA. (Land-based restrooms are currently ineligible.) We have received requests to revisit this restriction and consider the possibility of allowing floating restrooms to be attached to a dock and to allow piping to run directly from the floating restroom to a land connection for waste disposal. We ask you to comment on:

(i) Whether we should allow floating restrooms to be connected to land or docks. What are the advantages and disadvantages? Should there be limitations?

(ii) Are you aware of legal issues that affect floating restrooms, such as State or local regulations, permit restrictions, or building standards? If so, please discuss the effect and cite the regulation, code, or standard.

(iii) There are concerns with protecting floating restrooms from vandalism and other damage. If floating restrooms are allowed to be connected to land or docks, the potential for vandalism may increase with easier land-side access. Do you have any suggestions for how to address these concerns?

(iv) Is it important to maintain the emphasis on floating restrooms serving only the boating public? If we were to allow floating restrooms to be connected to docks, what approaches would restrict use to serve only the boating public?

(v) What approaches would ensure that floating restrooms are designed to limit land-side access and potential over-use by the non-boating public?

(vi) Should we participate in efforts to develop standards or best management practices for floating restrooms?

**Issue 2: State participation in offering Operation and Maintenance (O&M) funds for CVA projects.**

(a) Some States offer CVA O&M, and some do not. We suggest that offering O&M greatly benefits CVA by:

- (1) Increasing the number of pumpout facilities by supporting operators that otherwise might not be able to financially support ongoing service;
- (2) Providing a mechanism to reimburse operators when they respond to equipment failures, increasing pumpout facility availability and functionality; and
- (3) Helping to extend the useful life of the investment.

(b) The Service does not have a comprehensive list of how many and which States do not participate in offering O&M for pumpout projects, or the reasons why these States have chosen this approach. We would like to know more about those States that participate, and those that do not, in order to identify if changes in regulations or guidelines could improve this aspect of CVA. We ask States to respond telling us:

- (1) Does your State offer O&M grant funding to subgrantees and operators?
- (2) If your State does offer O&M funding, describe your program, including:



- (i) Any restrictions on the type of projects that may receive O&M funds;
- (ii) Any limits on O&M funds;
- (iii) How you administer O&M processing; and
- (iv) Any obstacles you currently experience that you suggest we may alleviate either through regulation or other means.

(3) If your State does not offer O&M funding, describe the reasons why your State has chosen not to offer O&M funding. If the reasons include laws or regulations, please cite as directed under **Information Requested**. Include in your comments changes you suggest we consider that might assist your State to begin a CVA O&M program.

**Issue 3: Do any existing or proposed State or local laws affect CVA?**

(a) Please cite, as directed under **Information Requested**, and discuss any State or local laws or regulations that either support or impede CVA projects. When available, include web links to the law or regulation.

(b) Discuss specifically how the law or regulation affects CVA projects. If it is a positive effect, tell us if you believe the Service should consider adopting similar principles. If it is a negative effect, tell us how it restricts your ability to complete successful projects. Please suggest any changes in the CVA regulation that would increase your ability to complete successful projects within the parameters of current or proposed State and local laws and regulations.

**Issue 4: User fees.**

(a) The current regulations at 50 CFR 85.44 allow operators of facilities constructed, operated, or maintained with CVA grant funds to charge users a maximum \$5 fee, with no

justification. If an operator chooses to charge a higher fee, it must be justified. The proceeds must be accounted for and used by the operator to defray the operation and maintenance costs of the facility as long as the facility is needed and serves its intended purpose. The Service was to evaluate the maximum fee each year for inflation and other potential considerations. The Service has not taken this action to date.

(b) During an open forum discussion at the States Organization for Boating Access Conference on October 6, 2014, we asked States to comment on the following questions:

- (1) Should the maximum fee be increased? Decreased?
- (2) What are the pros and cons of higher fees?
- (3) What alternatives do you suggest other than a maximum fee (Ex: sliding scale)?
- (4) Should fees correspond to usage (Ex: gallons pumped, holding tank size)?
- (5) Should the method of service influence the fees charged (Ex: self-serve vs. pumpout assistance)?

(c) We received a range of responses that fall into five general categories:

(1) Support no change to the current regulations. The \$5 maximum fee works well, and boaters are used to it.

(2) Suggest the regulations be changed to mandate or encourage free pumpout services. Offering free pumpout services increases the number of boaters using pumpouts, decreases the amount of inappropriately disposed boater septic waste, and reduces the burden for operators in States that offer CVA O&M funding.

(3) Suggest the regulations be changed to allow a sliding scale with a \$5 maximum for boats with smaller holding tanks, increasing fees with the size of the holding tank. An issue with

this option is that not all pumpout equipment is installed with monitoring capability to gauge the number of gallons pumped.

(4) Address the fee issue by maintaining a similar approach as in the current regulations, but increase the fee.

(5) Allow operators to charge a fee according to the prevailing market rate for the area they serve.

(d) We are interested in comments from States, boaters, operators, and interest organizations that address the questions and responses above. When responding, please consider:

(1) The maximum fee that boaters will accept as reasonable for the service they receive;

(2) How the fee schedule may influence boater usage;

(3) How the fee schedule may affect water quality;

(4) If we need to consider State and local laws or codes when establishing a fee schedule;

and

(5) How reduced fees may affect operators that incur additional costs for:

(i) Removing septic waste via a waste hauler from an on-site holding tank where municipal sewer service is not available;

(ii) Disposing of boater waste via municipal sewer connections where the municipality charges an additional fee for boater waste (Ex: hazardous waste disposal fee); or

(iii) Other actions to process or dispose of boater waste.

#### **Issue 5: Defining “recreational vessel” and access to CVA-funded services.**

(a) We have received many comments requesting clarity on how to define “recreational vessel” in the context of CVA and whether we should consider allowing CVA-funded facilities

to be available to non-recreational vessels (Ex: house boats, commercial vessels). We ask your comments on the following:

(1) How should we define “recreational vessel” for CVA? Should the term include vessels that are not for personal use, but that transport the public to recreational opportunities? (Ex: dive boats, fishing charters)

(2) What criteria might we use that would clearly separate a recreational vessel from a non-recreational vessel?

(b) We have considered that the ultimate benefit of CVA is clean recreational waters that benefit all users. We have engaged in discussions that ask us to consider allowing CVA-funded pumpouts to be available for use by other than what we define as a “recreational vessel.” We ask for comments on the following:

(1) Should CVA-funded facilities be available to serve all vessels, regardless of their designation as recreational or non-recreational? What are the advantages and disadvantages?

(2) If CVA-funded facilities are used to service other than non-recreational vessels, should operators be allowed to charge a higher fee for non-recreational use? (The rationale is that the higher fees would help pay for replacement/repairs of the equipment that will have a reduced useful life due to the additional burden on the equipment.)

(3) Are there any user groups or vessel types that should be fully excluded from consideration for expanding availability of CVA-funded pumpouts? Why or why not?

(4) If we choose to expand eligible use, what restrictions, if any, should be imposed on non-recreational vessels using CVA-funded pumpouts?

## **Issue 6: Definition of “useful life.”**

(a) The term “useful life” as used in the current CVA regulations was intended to relate to the functional longevity of the equipment. Using this approach, there are multiple considerations that could influence the useful life of a pumpout project, such as environmental effects (marine vs. freshwater environment, weather), biological effects (quagga mussels), amount and type of usage, adequate maintenance, boater education on proper use, and equipment components that are more vulnerable to wear or failure. In addition, it is likely that more than one of these considerations are present at one time, compounding potential impacts. Many States indicate that they have moved away from looking at the operational longevity of the equipment and instead have set a contractual requirement for the number of years the operator must maintain the equipment.

The above information has led us to reconsider our regulatory approach for how long a pumpout facility must be maintained and operational for its intended purpose. We also consider that a primary goal of CVA is to have sufficient available and functional pumpout facilities and that they contribute to a network of pumpout facilities for continued boater access and use.

(b) We typically employ useful life consideration for capital improvements. We define a “capital improvement” as: (1) a new structure that costs at least \$25,000 to build; or (2) altering, renovating, or repairing an existing structure if it increases the structure’s useful life by 10 years or if it costs at least \$25,000. The focus is on structures attached to real property.

The cost of a typical land-based pumpout facility is below the threshold for a capital improvement. Mobile or movable pumpout facilities, such as boats and floating restrooms, we consider personal property and not a capital improvement. We, therefore, must consider that

using useful life to measure obligation for a pumpout facility may not benefit the consistency and viability of the CVA program mission.

We suggest the alternative approach of applying in regulation an obligation for a minimum number of years that an operator must maintain an operational pumpout for its intended purpose. After this time, an operator may choose to continue the obligation for another period under the CVA grant program, continue operation outside the CVA grant program, or cease operation of the pumpout facility.

The majority of States responding to an inquiry suggested 10 years, but other suggestions ranged from 4 to 20 years.

(c) We ask for your comments on the following:

(1) Which approach do you suggest is the best for the continued success of CVA, and why do you prefer it?

(2) What obligation do you suggest an operator assume when participating in CVA, including how long an operator must maintain a CVA-funded pumpout facility?

(3) If a State offers O&M funding for existing facilities, should participation in O&M extend the obligation to maintain and operate the facility? For example, if we assume a fixed-year obligation for maintaining a pumpout facility, for each year that the operator receives O&M funding should it extend the obligation an additional year?

(4) What CVA-funded actions would you suggest we identify that, if completed, will restart the fixed-year obligation period? (Ex: replacement, major renovation, etc.)

(5) We discussed in **Issue 5** the possibility of expanding the type of vessels that could be serviced by CVA-funded facilities. If we choose the approach to require a fixed-year obligation

for a CVA-funded facility, the CVA-funded facility would be obligated to be maintained and functional for the designated period regardless of use, so additional wear and tear would be the responsibility of the operator to address during that period. What advantages, disadvantages, or other effects should we consider regarding this combined approach?

## **Public Participation**

We seek comments from you in response to the topics and questions above. We also seek any relevant comments on other issues related to this proposed rulemaking. We especially seek recommendations for effective and efficient approaches to CVA. After analyzing the comments received from this ANPR, we will proceed with a proposed rulemaking.

All submissions received must include the Service docket number for this notice. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal information—may be made publicly available. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

The Service supports a collaborative process as we develop the proposed rule. After the comment period ends for the ANPR, we will post information on other opportunities to comment prior to the proposed rule, background, and past comments received at:

<http://fawiki.fws.gov/display/CR5C8/CVA+Review+50+CFR+85+Home>.

Dated: August 31, 2015.

Karen Hyun,

Acting Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

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